

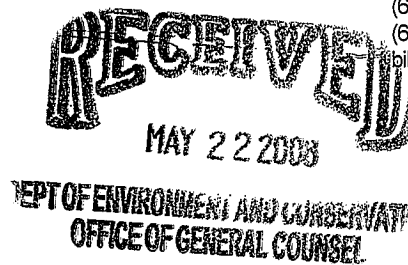
**STITES & HARBISON** PLLC  
ATTORNEYS

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May 22, 2008

**HAND DELIVERED**

Devin Wells, Esq.  
Assistant General Counsel  
Department of Environment & Conservation  
401 Church Street, 20th Floor  
L&C Tower  
Nashville, TN 37219-2310



William L. Penny  
(615) 782-2308  
(615) 742-0707 FAX  
bill.penny@stites.com

RE: Commissioner's Order, Case No. WPC07-0186, In the Matter of: Tennessee  
Department of Transportation and Dement Construction Company, LLC

Dear Devin:

Enclosed herewith is the Answer to the Commissioner's Order and Assessment and Petition for Hearing in the above referenced matter filed on behalf of Dement Construction Company.

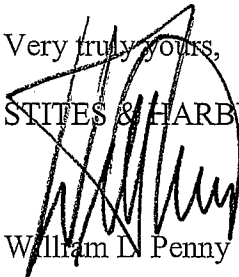
In addition, pursuant to the Tennessee Public Records Act, I am hereby requesting any and all documents, including field notebooks, emails or other electronic correspondence, memoranda, photographs, tape recordings, and biological studies pertaining to this matter. In addition, I am also requesting all copies of all documents addressing the civil penalty calculations and the natural resource damages assessment. This would include not only the work sheets, but also policy or guidance documents, memoranda or other documents relied upon in making such assessments.

I would appreciate receiving access to all such documents within thirty (30) days of today's date.

Please let me know if you have any questions.

**STITES & HARBISON**<sub>PLLC</sub>  
ATTORNEYS

Devin Wells  
May 22, 2008  
Page 2

Very truly yours,  
STITES & HARBISON, PLLC  
  
William D. Penny

Enclosure

cc: Ed Wallis, Esq.  
Houston Howell, Esq.

**BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD**

**IN THE MATTER OF:**

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**DIVISION OF WATER  
POLLUTION CONTROL**

**TENNESSEE DEPARTMENT OF  
TRANSPORTATION and,  
DEMENT CONSTRUCTION COMPANY,  
LLC**

**CASE NO. WPC07-0186**

**Respondents**

**DEMENT CONSTRUCTION COMPANY'S ANSWER TO COMMISSIONER'S ORDER  
AND ASSESSMENT AND PETITION FOR HEARING**

Comes now Dement Construction Company, LLC, by and through counsel, and hereby submits this Answer to Commissioner's Order And Assessment And Petition For Hearing, and for good cause would show:

1. The allegations in Paragraph I are admitted.
2. In response to the allegations in Paragraph II, Dement admits the first two sentences, but denies the third sentence in that the all lead process against a state agency should be served on the Attorney General and Reporter.
3. In response to the allegations in Paragraph III, Dement would show that the company that has a contract with Respondent Tennessee Department of Transportation is a Tennessee limited liability company and not a corporation. The remainder of the paragraph is admitted.

4. In response to the allegations in Paragraph IV, Dement would show the allegations are recitations to state statutes and rules, and would deny any language of the cited authority not expressly set out in such statute or rule.

5. In response to the allegations in Paragraph V, Dement does not have sufficient information to either admit nor deny the allegations relative to the Commissioner's status as trustee of natural resources. Further, Dement denies that the statute permits the Commissioner to assess damages by virtue of being a "trustee." Dement denies that the Commissioner has authority to assess "natural resources damages." Dement denies the applicability of the defined terms in Paragraph V and any reliance on such terms makes the action by the Commissioner void *ab initio*. Dement denies any language not expressly set out in Tenn. Code Ann. § 69-3-116 relative to damages.

6. In response to the allegations in Paragraph VI, Dement admits that it is a person, but denies it violated the Act.

7. In response to the allegations in Paragraph VII, Dement would show the allegations in the first sentence are not factual allegations but a paraphrase of the cited statute. Dement would deny any language not expressly contained in the cited statute. Dement admits the allegations concerning coverage under the TNCGP, but would deny that proper permit coverage was not obtained.

8. In response to the allegations in Paragraph VIII, Dement admits that Choate Creek, North Fork Choate Creek and its unnamed tributaries are waters of the state, but denies they have been classified under Department Rule 1200-4-4 or that the Board has classified all waters of the state. Further, Dement denies the allegations regarding the designation of North

Fork Choate Creek as "outstanding Tennessee waters" as no such classification or designation exists.

9. Dement admits the allegations in Paragraph IX.
10. Dement admits the first sentence in Paragraph X. Dement denies the second sentence.
11. In response to the allegations in Paragraph XI, Dement admits the inspection was conducted and a report generated, but that such report speaks for itself. Respondent denies such report represents a violation of the Act. Dement lacks sufficient information to either admit or deny the last sentence in Paragraph XI.
12. In response to the allegations in Paragraph XII, Dement lacks sufficient information to either admit or deny the allegations therein.
13. In response to the allegations in Paragraph XIII, Dement admits that a meeting occurred on June 25, 2007 but denies the remainder of the paragraph.
14. In response to the allegations in Paragraph XIV, Dement admits that CEC personnel conducted a stream assessment and issued a report, but that the report speaks for itself. Further, Dement lacks sufficient information to either admit or deny the allegations pertaining to impacts.
15. Dement lacks sufficient information to either admit or deny the allegations in Paragraph XV.

16. Dement lacks sufficient information to either admit or deny the allegations in Paragraph XVI.

17. In response to the allegations in Paragraph XVII, Dement admits that the Division issued a notice of violation, but would deny any violations therein. Further Dement would show the requirements contained in the NOV speak for themselves.

18. Dement denies the allegations in Paragraph XVIII.

19. Dement denies the allegations in Paragraph XIX.

20. Dement denies the allegations in chronologically ordered XX (but misstated as XXI.).

21. To the extent a response is required, Dement denies the allegations or any liability in the Order and Assessment Paragraph (chronologically ordered Paragraph XXI but misstated as XVIII). Further, the penalties and other assessments are grossly excessive, not supported by evidence that is substantial or material, is arbitrary or capricious and far exceeds the express or implied powers granted to the Commissioner.

22. Any allegation not expressly admitted or denied is hereby denied.

23. As Dement's First Affirmative Defense, Dement would show that the Commissioner's Order and Assessment fails to state a claim for which relief may be granted, in that natural resources damages as that term is used and assessed in the order is not a claim which is recognized by the Water Quality Control Act.

24. As Dement's Second Affirmative Defense, Dement would show that the action relative to natural resources damages is void because it is based upon an unpromulgated rule.

25. As Dement's Third Affirmative Defense, Dement would show the Commissioner has no authority to assess natural resources damages as defined in this Order and any such assessment exceeds the statutory authority of the Department and is *ultra vires*.

26. As Dement's Fourth Affirmative Defense, Dement would show that in assessing the civil penalty and the natural resources damages the Commissioner did not properly consider the factors required to be considered by Tenn. Code Ann. § 68-3-115.

27. As Dement's Fifth Affirmative Defense, Dement would show that the acts complained of were Acts of God and an unavoidable accident.

28. As Dement's Sixth Affirmative Defense, Dement would show upon information and belief that actions complained of were in whole or in part the responsibility of third parties.

29. As Dement's Seventh Affirmative Defense, Dement would show that the Board's classification of waters not specifically named in rule 1200-4-4 is in excess of their authority as set out by the Water Quality Control Act. Any action taken by the Commissioner in reliance upon such rules is based upon unlawful process and is otherwise unconstitutional.

NOW, HAVING FULLY RESPONDED, Respondent Dement Construction Company hereby appeals the Commissioner's Order and Assessment to the Water Quality Control Board and requests a hearing. At such hearing Dement requests that this matter be Dismissed with prejudice and Dement be awarded such other, further and general relief to which it may be entitled.

Respectfully submitted,

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William L. Penny (Sup. Ct. No. 009606)  
STITES & HARBISON, PLLC  
401 Commerce Street  
Suite 800  
Nashville, TN 37219-2376  
Telephone: (615) 244-5200

Counsel for Dement Construction Company



**BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD**

**IN THE MATTER OF:**

) **DIVISION OF WATER**  
) **POLLUTION CONTROL**  
)

**TENNESSEE DEPARTMENT OF  
TRANSPORTATION and,  
DEMENT CONSTRUCTION COMPANY,  
LLC**

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) **CASE NO. WPC07-0186**  
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**Respondents**

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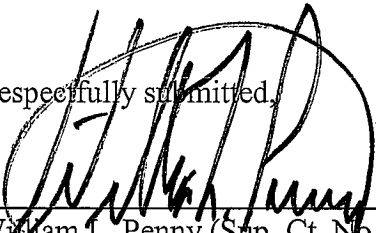
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